Supreme Court, U.S.
FILED
MAY - 8 2000
OFFICE OF THE CLERK

No. 00-408

IN THE

Supreme Court of the United States

PHILIP CONDON FISHER,

Petitioner,

v.

UNITED FEATURE SYNDICATE INC.
(a Scripps Howard Company), et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT.

SUPPLEMENTAL APPENDIX

PHILIP CONDON FISHER
1180 South Yerba Santa Drive,
Pueblo West, Colorado 81007-1947
(719) 647—2474

Petitioner/pro se

SUPPLEMENTAL APPENDIX

PHILIP CONDON FISHER,

Plaintiff - pro se,

v.

UNITED FEATURE SYNDICATE INC., et al.,

Defendants.

No. 96-WM-1895

In The United States District Court

For The District Of Colorado

June 4, 1997

Per Mr. Clayton Higgins telephone instructions of the Supreme Court on July 7, 2000; the following Recommendation of recused Magistrate Judge Donald E. Abram, is hereby supplemented to Petitioner Fisher's Appendix.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
JUNE 04, 1997
JAMES R. MANSPEAKER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-WM-1895

PHILIP CONDON FISHER,
Plaintiff,

v.

UNITED FEATURE SYNDICATE, INC. (a Scripps Howard Company), THE DENVER PUBLISHING CO., THE E.W. SCRIPPS COMPANY, CHARLES SCHULZ/UNITED FEATURE SYNDICATE, LEE MENDELSON, BILL MELENDEZ, WHOLESALE WAREHOUSING OF CANADA, CYCLONE INCORPORATED, THE VIDEO STATION, MID-AMERICAN INDUSTRIES INC., CBS INC., NEWS AMERICA PUBLISHING INC., KELLOGG COMPANY, IBC HOLDINGS CORPORATION, MCDONALD'S CORPORATION, DAYTON HUDSON CORPORATION, THE WALT DISNEY COMPANY/ABC, ADVANCE PUBLICATIONS INC., SI HOLDINGS INC., METROPOLITAN LIFE INSURANCE CO., CAPITAL CITIES/ABC INC., HALLMARK CARDS, INC., TCI OF COLORADO, GENERAL ELECTRIC COMPANY/RCA/TCE, TURNER BROADCASTING SYSTEM INC., UNIVERSAL PRESS SYNDICATE, INC., KING FEATURES SYNDICATE, INC., COWLES SYNDICATE INC. (Hearst Companies), WASHINGTON POST WRITERS GROUP, SEARS ROEBUCK AND

CO., MONTGOMERY WARD & CO., KACEY FINE FURNITURE, SOUNDTRACK, FINGERHUT CORPORATION, BEST BUY COMPANY, TYSON FOODS, INC., SAFEWAY INC., KING SOOPERS, ALBERTSON'S FOOD & DRUG STORES, and KMART STORES,

Defendants.

RECOMMENDATION OF UNITED STATES

MAGISTRATE JUDGE

Magistrate Judge Abram

This matter comes before the Court regarding multiple motions to dismiss by Defendants, motions for summary judgement by Plaintiff, and motions to strike by several parties. United States Magistrate Judge Donald E. Abram hereby makes the following recommendation.

I. INTRODUCTION

Plaintiff, appearing pro se, has filed a lengthy complaint naming numerous Defendants in this action for copyright infringement. Plaintiff created "Chipper," an unpublished comic strip and manuscript featuring the character Chipper, an "inherent cowardly, Sherlock dog detective." Complaint at ¶ 37. Plaintiff owns copyright on "Chipper" dated 1971, 1988, and 1991. Most of Plaintiff's claims concern the "Chipper" comic strip and manuscript. Plaintiff also owns a copyright for another comic strip, "Langsyne," which is subject of additional claims.

II. STANDARD OF REVIEW

Courts should liberally construe pleading prepared by a pro se litigant. Haines v. Kerner, 404 U.S. 519, 520 (1972); Gagan v. Norton, 35 F.3d 1473, 1474 n.1 (10th Cir. 1994, cert. denied, 115 S.Ct. 1175 (1995). Since this is a pro se complaint, it will be liberally construed in favor of Plaintiff.

A. Motions to Dismiss

For purposes of a motion to dismiss, the court must accept all factual allegations in the complaint as true and resolve all reasonable inferences in favor of the plaintiff. Tri-Crown, Inc. v. American Federal Sav. & Loan Ass'n, 908 F.2d 578, 582 (10th Cir 1990). A case should not be dismissed for failure to state a claim unless the court determines beyond doubt that the plaintiff can prove no set of facts which entitles him to relief. Id.

B. Summary Judgement

Summary judgement is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c); Conway v. Smith, 853 F.2d 789, 792 (10th Cir. 1988). "One of the principal purposes of the summary judgement rule is to isolate and [d]ispose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). On a motion for summary judgement, the court views the factual record and any reasonable inferences arising from it in the light most favorable to the nonmoving party. Otteson v. United States, 622 F.2d 516, 519 (10th Cir. 1980). "To avoid summary judgement, the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Summary judgement may be granted if the evidence is merely colorable or is non-

significantly probative." Vitkus v. Beatrice Co., 11 F.3d 1535, 1539 (10th Cir. 1993). If the court concludes that, based on the record as a whole, no "rational trier of fact" could find for the nonnmoving party, summary judgement is appropriate. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. DISCUSSION

A. Rule 8

Several Defendants have moved for dismissal of Plaintiff's complaint[1] for failure to comply with Fed. R. Civ. P. 8. The complaint contains 128 numbered pages and several additional unnumbered pages and lists 43 claims for relief. Much of the complaint consists of rambling paragraphs containing irrelevant and conclusory allegations. Rule 8 of the Federal Rules of Civil Procedure requires that pleadings contain "a short and plain statement of claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8 (a) (2). A court may dismiss a complaint which does not comply with Rule 8 (a) (2). Carpenter v. Williams, 86 F. 3d 1015, 1016 (10th Cir. 1996) (dismissal appropriate where pleadings fell well short of requirements of Rule 8 and were incomprehensible). As Plaintiff has filed his complaint pro se, the Court must construe his pleadings liberally; however, it is not "the proper function of the district court to assume the role of advocate for the pro se litigant." Hall v.

[1] Plaintiff's amended complaint was filed November 14, 1996. All references to the "complaint" in this recommendation are references to the amended complaint.

Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Plaintiff has requested leave to file a second amended complaint. Although he has not provided a copy of the proposed second amended complaint to the Court, he has indicated that the proposed second amended complaint merely deletes references to exhibits which have not been properly served on all Defendants. [2] Plaintiff has not complied with the requirements of Rule 8 because none of his claims makes a "short and plain statement." Because Plaintiff's proposed amendments apparently would not remedy this defect, Plaintiff's complaint is subject to dismissal; however the complaint should be dismissed for additional reasons, discussed below.

B. State of Limitations

Several Defendants argue that many of the Plaintiff's claims are barred by the statute of limitations. The Copyright Act provides that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b) (1996). A cause of action under this section accrued when one has knowledge of a violation or is chargeable with such knowledge. Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994). Thus, the statute allows recovery only for those acts occurring

---

[2] On March 26, 1997, the Court entered an order granting multiple motions to quash service of the original complaint based on the failure of Plaintiff to serve all Defendants with copies of the exhibits which are part of the complaint. Although Plaintiff has certified that he served two sets of the exhibits on a law firm representing several of the Defendants, it is not clear whether the majority of the Defendants have been properly served with a complete complaint, including the exhibits. Nevertheless, this recommendation addresses the merits of Plaintiff's claims because the parties address the merits of their motions.

within three years of suit. Stone v. Williams, 970 F.2d 1043, 1049-50 (2d Cir. 1992). Furthermore, § 507(b) "does not provide for a waiver of infringing acts within the limitation period if earlier infringements were discovered and not sued upon, nor does it provide for any reach back if an act of infringement occurs within the statutory period." Roley, 19 F.3d at 481 (quoting Hoey v. Dexel Sys. Corp., 716 F.Supp. 222, 223 (E.D. Va. 1989)).

Plaintiff filed his complaint on August 12, 1996. Therefore, all claims which accrued prior to August 12, 1993 are barred under § 507(b). In particular, claims one, two, twenty-three, twenty-four, twenty-five, twenty-eight, twenty-nine, thirty, thirty-five, thirty-six, thirty-seven, and thirty-eight should be dismissed in their entirety because all allegations in those claims concern acts which occurred prior to August 12, 1993.[3] In addition, claims three through fifteen,[4] twenty-six, twenty-seven, thirty-two, thirty-three, and forty-two should be dismissed to the extent they allege acts which occurred prior to August 12, 1993.

C. Standing

---

[3] In some instances, Plaintiff claims he did not discover the alleged infringement until after August 12, 1993; however, he is charged with knowledge of the alleged infringements on the date they occurred. Plaintiff has demonstrated that he was actively and continuously searching for infringements prior to August, 1993.

[4] Claims three through fifteen concern publication of books, cards, and video and audio tapes which were originally published prior to August 12, 1993; however, Plaintiff alleges these items were being sold by Defendants at the time he filed his complaint.

Several Defendants argue that Plaintiff does not have standing to sue with regard to his claims which accrued after September 12, 1993 because plaintiff was not the owner of the copyrights between 1988 and September, 1996. The Copyright Act provides "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled... to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. § 501(a) (1996) (emphasis added). Rights under a copyright may be assigned; however, at least one circuit court has held that if "accrued causes of action are not expressly included in the assignment, the assignee will not be able to prosecute them." ABKCO Music, Inc. v. Harrisongs Music, Ltd., 944 F.2d 971, 980 (2d Cir. 1991). Thus, "the assignee is only entitled to bring actions for infringements that were committed while it was the copyright owner[,] and the assignor retains the right to bring actions accruing during its ownership of the right, even if the actions are brought subsequent to the assignment." Id.

In this case, Plaintiff is the author and original owner of the copyright at issue. In 1988, 1990, and 1991, Plaintiff transferred all his rights in his copyrights to Fisher's Master Artists Inc. The original complaint in this action was filed by Fisher's Master Artists Inc. with the current Plaintiff appearing pro se for the corporation. Because the complaint was subject to dismissal due to his attempted pro se representation of the corporation, the current Plaintiff filed his amended complaint on November 14, 1996, replacing Fisher's Master Artists Inc. with himself as the sole Plaintiff. Fisher's Master Artists Inc. transferred its ownership of the copyrights back to Plaintiff in September, 1996.

The minutes of Fisher's Master Artists Inc. meeting at which

the corporation "ratified" the sale and transfer of the "Chipper" and "Langsyne" copyrights does not expressly refer to infringement claims which had accrued at that time. Defendants are therefore correct that Plaintiff was not the owner of the copyrights or the rights to institute actions for the infringement of the copyrights between August 12, 1993 and the filing of this lawsuit. Thus, any actions which are not barred by the statute of limitations are barred because Plaintiff did not own the copyrights at the pertinent times and does not own the rights to prosecute the infringement claims.

D. Copyright Infringement

Notwithstanding the above, the Court has analyzed the merits of each of Plaintiff's claims, particularly to the extent they would not be barred by the statute of limitations if Plaintiff did own the right to prosecute the infringement claims. To prevail on his claims for copyright infringement, Plaintiff must establish that he owns a valid copyright and that Defendants copied the original elements of his copyrighted work. Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1284 (10th Cir. 1996). Absent direct evidence of copying, Plaintiff can indirectly prove copying by establishing that Defendants had access to the copyrighted work and that probative similarities exist between the copyrighted material and the allegedly copied material. Id. Liability for copyright infringement attaches only where protected elements of a copyrighted work are copied. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d, 823, 833 (10th Cir. 1993). Thus, "[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected." Feist, 499 U.S. at 348.

"One of the fundamentals of copyright law is that a copy-

right does not protect an idea, but only the expression of the idea." Autoskill Inc. v. National Educ. Support Sys., 994 F.2d 1476, 1491 (10th Cir 1993). The Copyright Act provides "[i]n no case does copyright protection for an original work or authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1996). Therefore, to determine claims for copyright infringement, the Tenth Circuit has utilized an "abstraction-filtration-comparison" test. Country Kids, 77 F.3d at 1284. Using this test, the court first must separate the ideas which are not protectable from the particular expression of the work. Id. at 1285. Then, the court must filter out the unprotected components of the product from the original expression. Id. Finally, the court compares the remaining protected elements to the allegedly copied work to determine whether the two works are substantially similar. Id.

To determine substantial similarity, the Tenth Circuit has stated that the "ordinary observer" test is an appropriate method. ID. at 1288. The court must consider "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated plaintiff's protectable expression by taking material of substance and value." Id. (quoting Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 614 (7th Cir. 1982)). Stated otherwise, "[t]he essence of this test is whether the 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same,'" Id. (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir 1960)). Although the issue of substantial similarity may be an issue of fact for resolution by a jury, a court may determine non-in-

fringement as a matter of law where (1) the similarity between the two works concerns only non-copyrightable elements of the plaintiff's work or (2) no reasonable jury could find that the two works are substantially similar. Warner Bros. Inc. v. American Broadcasting Companies, 720 F.2d 231, 240 (2d Cir. 1983).

E. Chipper Sherlock Dog vs. Snoopy Sherlock Dog

Many of Plaintiff's claims are based on the allegation that television broadcasts, videotapes, books, and audiotapes based on the Peanuts comic strip story "It's a Mystery, Charlie Brown," allegedly first broadcast in 1974, infringe on Plaintiff's copyright of his "Chipper" comic strip and manuscript. Specifically, claims one through four, six through fifteen, eighteen, nineteen, and twenty-two concern "It's a Mystery, Charlie Brown" or the Peanuts character Snoopy portrayed as "Sherlock" detective character. Multiple Defendants have filed motions to dismiss these claims, and Plaintiff has filed several motions for summary judgement on some of his claims.

Plaintiff's primary basis for his claims is that both the Chipper and Snoopy characters are portrayed as "cowardly" detective dogs. The law is well established, however, that Plaintiff's copyrights on "Chipper" do not extend to the mere idea of a cowardly detective dog. 17 U.S.C. § 102(b); Perma Greetings, Inc v. Russ Berrie & Co., 598 F. Supp. 445, 448 (E.D. Mo. 1984) ("[T]he theme,' the 'plot,' the 'ideas' always may be freely borrowed."); Country Kids, 77 F.3 at 1285 (differentiating between expression and ideas.) Rather, only Plaintiff's expression of the idea is protected. Autoskill, 994 F.2d 1476.

Copyright protection is available for characters portrayed in cartoons. E.g., Warner Bros., 720 F.2d at 240. "In determining whether a character in a second work infringes a cartoon

character, courts have generally considered not only the visual resemblance but also the totality of the characters' attributes and traits." Id. at 241. This has been characterized as the "total concept and feel" of the copyrighted character. Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1167 (9th Cir. 1977).

Plaintiff has not alleged or established that any traits of the characters of Chipper and Snoopy are similar other than their portrayal as cowardly detectives. Additionally, a fair viewing of "It's a Mystery, Charlie Brown" and Snoopy's character traits in the story does not indicate that Snoopy is depicted as cowardly. Rather, Snoopy aggressively searches for clues and confronts the other characters in the comic strip as to the location of Woodstock's stolen nest. Furthermore, consistent with Snoopy's traditional character, he does not speak like a human, while Chipper speaks and has more human-like characteristics.

Similarly, Plaintiff's sixteenth and seventeenth claims for relief allege that a Metropolitan Life Insurance Company commercial starring Snoopy as a "Sherlock Dog" infringes on his "Chipper" copyrights. Defendant Metropolitan Life Insurance Company filed a motion to dismiss. In addition, Plaintiff filed a motion for summary judgement on his sixteenth and seventeenth claims against Metropolitan, United Features Syndicate, Charles M. Schulz, and ABC, and CBS. [5]

---

5 Metropolitan Life Insurance Company's Motion also contained a motion to quash service of process which was granted. The Court's minute order of April 16, 1997 states that the motion for summary judgement against Metropolitan is therefore moot. This recommendation nevertheless addresses Plaintiff's sixteenth and seventeenth claims as they are asserted against Metropolitan, in the event Metropolitan is served with a valid complaint, and other Defendants.

Again, Plaintiff has failed to establish any similarity in the characters besides the fact that they are both dog detectives. In fact, Plaintiff notes several differences in the two characters. Chipper is a "double life detective and lawyer," while Snoopy is a "double life Met Life Insurance agent." Chipper is inherently cowardly, while Snoopy is inherently a hero who is out of character as a "cowardly Sherlock dog."

In comparing the total concept and feel of "Chipper" to "It's a Mystery, Charlie Brown" and the Chipper and Snoopy characters, the ordinary observer would not be disposed to overlook the disparities and regard their aesthetic appeal as the same. No reasonable jury could find that Chipper is substantially similar to Snoopy as portrayed in "It's a Mystery, Charlie Brown" and the Metropolitan Life commercials, and Defendants are entitled to judgement as a matter of law on Plaintiff's claims one through four, six through nineteen, and twenty-two.

F. <u>"Chipper the Cartoon Dog vs. "Chipper" the Puppy</u>

Plaintiff's twentieth claim for relief alleges that advertisements featuring a picture of a puppy with the name "Chipper" infringe on his "Chipper" comic strip copyrights. The advertisements portray the well-known dog associated with RCA and Victor Records, "Nipper," sitting next to a puppy, "Chipper." Plaintiff alleges that a group of the Defendants ("the RCA Defendants") advertised using the "Chipper" puppy in newspapers and on television. Defendants Sears, Roebuck and Co., General Electric Company, Thomson Consumer Electronics, Inc., Montgomery Ward & Co., Jack Barton & Co., Best Buy Company, Fingerhut Corporation, and Ultimate Electronics filed motions to dismiss and/or to strike Plaintiff's amended complaint. Defendants News America Publishing and Turner Broadcasting have joined in the motions to dismiss as to the twenti-

eth claim. In addition, Plaintiff filed motions for summary judgement and to strike Defendants' pleadings on his twentieth claim for relief as to Defendants Sears, Roebuck and Co., General Electric Company, Thomson Consumer Electronics, Inc., Montgomery Ward & Co., Jack Barton & Co., Fingerhut Corporation, and Best Buy Company.

Plaintiff's twentieth claim fails as a matter of law. First, Plaintiff fails to allege or establish access to Plaintiff's work by the Defendants named in this claim for relief. Absent direct evidence of copying, access by Defendants to Plaintiff's work is an element which Plaintiff must establish. Country Kids, 77 F.3d at 1284. Furthermore, the name "Chipper" is not subject to copyright protection. "Words and short phrases such as names, titles, and slogans" are not subject to copyright protection. 37 C.F.R. § 202.1. See also Arvelo v. American Int'l Ins. Co., 875 F. Supp. 95, 100 (D.P.R.), aff'd, 66 F.3d 306 (1st Cir. 1995). Plaintiff's copyright protects his comic strip in its entirety rather than the name "Chipper." See id. at 101 (holding copyright protected advertising campaign in its entirety, rather than two words from the whole document). By obtaining copyrights for his comic strip, Plaintiff has not gained a monopoly on the use of the name "Chipper." Therefore, to establish infringement of his copyrights, Plaintiff would have to show that the RCA puppy "Chipper" is otherwise substantially similar to the Plaintiff's comic strip character "Chipper."

Plaintiff's character Chipper is a cartoon dog with human-like qualities. The character is a pen and ink portrayal of an "inherent cowardly, Sherlock dog detective" who thinks and talks much like a human. The RCA puppy Chipper is a real-life puppy, sometimes portrayed in a photograph and sometimes in a drawing. The puppy does not have human-like char-

acteristics and is not featured acting like a human. The puppy is not part of a cartoon comic strip, but it is featured in advertisements for RCA products. The only similarity between Chipper, the RCA puppy, and Chipper, the comic strip character is the name. Thus, considering the total concept and feel of the characters and having filtered out the unprotected element of the name, no reasonable jury could find that the two works are substantially similar. The RCA Defendants are entitled to judgement as a matter of law on Plaintiff's twentieth claim for relief.

G. "Chicken Chipper" vs. "Chick'n Chipper"

Plaintiff's twenty-first claim alleges that frozen food packages manufactured by Tyson Foods infringed on his "Chipper" copyrights. The Tyson Foods package labels feature "Chick'n Chippers," which are boneless chicken patties covered in potato coating. Plaintiff's comic strip "Chipper uses the phrase "Chicken Chipper" several times in reference to the "cowardly" dog, Chipper. According to Plaintiff, the phrase "Chicken Chipper" is the "very essence" or "core expression" of his "Chipper" creation. Complaint at ¶ 173. Plaintiff alleges that he purchased the "Chick'n Chippers" packages at Safeway, King Soopers, Albertson's and Super K Grocery Stores and that those Defendants are "vicarious infringers" of his copyrights. Complaint at ¶ 173.

Defendants King Soopers, Albertson's, and Tyson Foods each filed motions to dismiss. These motions were joined by Defendants Safeway and Kmart Corporation. Plaintiff then filed a motion for summary judgement against King Soopers and Safeway and an additional motion for summary judgement against King Soopers, Safeway, Albertson's, and Tyson Foods.

Plaintiff's twenty-first claim fails for several reasons. First,

Plaintiff again has not alleged or established access by the Defendants named in this claim to his unpublished copyrighted work. Second, the words "Chicken Chipper" in Plaintiff's comic strip are not protected by Plaintiff's copyright. Plaintiff argues that because the phrase "Chicken Chipper" is nearly identical to the phrase "Chick'n Chippers," substantial similarity is established. This argument, however, ignores established copyright law that words and phrases are not subject to copyright protection. 37 C.F.R. § 202.1; Arvelo, 875 F. Supp. at 100. Thus, Plaintiff's copyright protects his comic strip in its entirety rather than the phrase or name "Chicken Chipper." As discussed in connection with Plaintiff's twentieth claim, Plaintiff's copyrights do not grant him a monopoly on the use of the words "Chicken" or "Chipper" or the phrase "Chicken Chipper."

Having filtered out the unprotected element of Plaintiff's works, Plaintiff's claim fails because Tyson's package is not substantially similar to Plaintiff's work. In fact, the two "works" are not even based on a similar idea. Plaintiff's work describes a dog cartoon character named Chipper as a "chicken" to depict the cowardly nature of the dog. Tyson's package portrays its frozen chicken food product. Comparing the Tyson package to Plaintiff's comic strip, an ordinary, reasonable observer would not conclude that Tyson unlawfully appropriated Plaintiff's protectable expression. Therefore, as a matter of law, Plaintiff's twenty-first claim for relief should be dismissed.

H. "Chipper" vs. Peanuts and Other Comic Strips

Plaintiff also asserts that Peanuts greeting cards and comic strips and numerous other comic strips copied certain words or phrases from his "Chipper" comic strip and manuscript. Claims four, twenty-three through thirty-four, and thirty-six through

forty-three concern "Chipper" as compared to various comic strips. Several Defendants have filed motions to dismiss; Plaintiff has filed motions for summary judgement on some of these claims.

Each of these claims should be dismissed for similar reasons as discussed above. For example, Plaintiff's fifth and thirtieth claims for relief allege that a 1978 Hallmark greeting card and other comic strips infringe on his "Chipper" manuscript. In the greeting card, the Peanuts characters are discussing Charlie Brown dressing up as a ghost for Halloween by using an old sheet with eye holes cut in it. As Charlie Brown walks by in the sheet, appearing as Charlie Brown covered in a sheet rather than a ghost, the character Linus states, "Somehow, something seems to have gotten lost in the translation!" In Plaintiff's "Chipper" manuscript, the characters are discussing the character Chipper's "swill soup." The character Sydney gestures a "thumbs down" sign. Chipper misunderstands an happily ladles more soup into Sydney's bowl. Sydney states, "Somehow, somebody lost something, somewhere, someway in the translation!??" Another comic strip, "Born Loser," uses the phrase "it seems to lose something in the translation" in a different context--a discussion between a husband and wife. Plaintiff also attaches a newspaper article from the Rocky Mountain News in which a headline reads, "French 'Reeds' loses something in translation." Plaintiff's Ex. 45. Besides the use of a phrase regarding losing the meaning in translation, the works are completely different. This is a classic example of various authors using a common idea or theme expressed in a completely different manner from Plaintiff's work. As previously noted, neither short phrases nor ideas are subject to copyright protection. 37 C.F.R. § 202.1; 17 U.S.C. § 102(b); Autoskill, 994 F.2d at 1491. After filtering out the unprotected elements

of Plaintiff's comic strip and manuscript and comparing the works to the alleged infringers, the works are not substantially similar.

The remainder of Plaintiff's claims which allege copying by comic strips fail for the same reasons. Plaintiff's contentions that his ideas and use of certain words or phrases misconstrue the fundamentals of copyright law. This is true for Plaintiff's use of the word "serious" in connection with activities such as painting or sports (twenty-third claim); the use of a reference to rabies or being rabid (twenty-fourth claim); comic strips about fishing and the idea of catching the fish's relatives (twenty-fifth and forty-first claims); the idea of not paying for something until tomorrow (twenty-sixth claim); the idea of a character's enthusiasm for a task being thwarted by elements such as newly seeded grass, rain, or snow (twenty-seventh claim); the idea of mistakenly going to work or school on a Saturday or Sunday (twenty-eighth and twenty-ninth claims); the idea of having good intentions about working and then falling asleep on the job (thirty-first claim); the idea of using a broken umbrella or not opening an umbrella in the rain because the weather forecast did not call for rain (thirty-second claim); the idea of admiring one's self in the mirror (thirty-third and thirty-fourth claims); the idea of chasing something and then changing one's mind and going the opposite direction (thirty-sixth claim); the idea of "holding down a job" by sitting on menus vs. having the "job" of being a paper weight (thirty-seventh claim); the idea of intentionally listening to a record with the sound off vs. enjoying listening to a record that skips (thirty-eighth claim); the idea of a character finding something he believes is old and valuable when the item is actually something else of little value (thirty-ninth claim); the idea of something being up a character's nose (fortieth claim); the idea of

dogs climbing trees (forty-first claim); the idea of swatting flies (forty-second claim); and the use of many other ideas, words, or phrases which Plaintiff used in his comic strips or manuscripts (forty-third claim).

Although the key to the ordinary observer test is substantial similarities, not differences, courts have acknowledged that "a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to the plaintiff's." Perma Greetings, 598 F. Supp. at 449-450. See also Warner Bros., 720 F.2d at 241 (noting that numerous differences between works tend to undercut substantial similarity). Furthermore, "where the protected work and accused work express the same idea, similarity that inevitably stems solely from the commonality of the subject matter is not proof of unlawful copying." Durham Indus., Inc. v. Tomy Corp. 630 F.2d 905, 913 (2d Cir. 1980).

A comparison of each of the comic strips in Plaintiff's claims shows that the only elements which are arguably common to the Plaintiff's "Chipper" comic strip and manuscript are ideas, themes, single words, or phrases. These elements are not protected. Country Kids, 77 F.3d at 1285. "The similarity to be assessed must concern the expression of ideas, not the ideas themselves." Warner Bros., 720 F.2d at 239 (emphasis added). Liability for copyright infringement attaches only where protected elements of a copyrighted work are copied. Gates Rubber, 9 F.3d at 833 (emphasis added).

Plaintiff mistakenly asserts that the alleged "core expression" of his work, which is actually his idea for the plot, theme or a phrase in the comic strip, is protected. He has failed to establish any similarity in the expression of his ideas as com-

pared with the alleged infringing works and in some instances, his exhibits even note the different manner in which the ideas are expressed. In each case, the characters are different and not similar to the Plaintiff's "Chipper" characters, the situations in which the ideas, words, or phrases are expressed are different, and the manner in which they are expressed are different. Under the ordinary observer test, an ordinary, reasonable person would not find any of the comic strips referenced in Plaintiff's claims to be substantially similar to Plaintiff's "Chipper." Therefore, Defendants are entitled to judgement as a matter of law on Plaintiff's claims four, twenty-three through thirty-four, and thirty-six through forty-three.

I. "Langsyne" Comic Strip vs. "For Better or Worse" Comic Strip

Plaintiff's thirty-fifth claim for relief alleges that the comic strip "For Better or Worse" infringes on the copyright of his comic strip "Langsyne," dated 1975. Defendant Universal Press Syndicate filed amotion to dismiss this claim, and Plaintiff filed a motion for summary judgement as to this claim.

Plaintiff's "Langsyne" portrays four children in a neighborhood backyard. Two of the boys admire a girl sun bathing on a blanket. Another boy states "She ain't swell at all -- just my sister." In the "For Better or Worse" comic strip, four women appear standing on a sidewalk in a snow storm. Three of the women admire a man passing by in a car who honks his horn. One of the women then states, "That was disgusting. . . . That was my brother." Plaintiff's Ex. 50.

Plaintiff again mistakenly attempts to assert that his ideas are protected by the copyright. Although the ideas or themes of the two comic strips are similar, the expression of the ideas

is not substantially similar. Plaintiff asserts that the comic strips are similar because they are based on the same "core expression" communicated in "direct opposites" (i.e. summer clothes vs. winter clothes, little boys vs. big girls, brother vs. sister, etc.). As such, Plaintiff again attempts to identify his idea as the core of protectable expression in his work. The differences in the expression of the idea or plot of the comic strips, however, are precisely the attributes that make the two works different. In this case, the only similarity in the two works is the underlying plot or theme. Under the ordinary observer test, a reasonable jury could not find the "Langsyne" comic strip substantially similar to the "For Better or Worse" comic strip. Therefore, Defendants are entitled to judgement as a matter of law on Plaintiff's thirty-fifth claim for relief.

IV. CONCLUSION

For the above named reasons, Defendants are entitled to judgement as a matter of law on each of Plaintiff's claims.

THEREFORE, IT IS RECOMMENDED that the following motions be granted to the extent they seek dismissal of Plaintiff's claims, and that the complaint be dismissed in its entirety:

1. Motion to Dismiss the Defendant of King Soopers, filed December 17, 1996;

2. Response of Defendant Safeway Inc. to Plaintiff's Amended Complaint, filed December 20, 1996 (referencing joinder in motion to dismiss filed by Defendant King Soopers);

3. Defendant TCI of Colorado's Motion to Dismiss or for Summary Judgement, filed January 10, 1997;

4. Defendant Metropolitan Life Insurance Co.'s Motion to

Quash Service of Process, or Alternatively, Motion to Dismiss, filed January 10, 1997;

5. Sears, Roebuck and Co.'s Motion to Dismiss and/or Strike Plaintiff's Amended Complaint, filed January 10, 1997;

6. Joint Motion for Dismissal of Plaintiff's Amended Complaint by Defendants General Electric Company, Thomson Consumer Electronics, Inc., Montgomery Ward & Co., Jack Barton & Co. and Best Buy Company, filed January 13, 1997;

7. Defendant Fingerhut Corporation's Motion to Quash Service of Process or, Alternatively, Motion to Dismiss, Filed January 21, 1997;

8. Defendant Albertson's, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint, filed January 21, 1997;

9. Defendant Albertson's Joinder in King Soopers' Motion to Dismiss, filed January 21, 1997;

10. Defendant Tyson Foods's Motion to Dismiss for Failure to State a Claim, filed January 21, 1997;

11. Defendant Universal Press Syndicate, Inc.'s Motion to Dismiss or, in the Alternative, Strike Plaintiff's Complaint, file January 22, 1997;

12. Defendants United Feature Syndicate, Inc., The E.W. Scripps Co., Charles Schulz and Charles M. Schulz Creative Associates, The Denver Publishing Co., United Media & Newspaper Enterprise Association, Inc., News America Publishing Inc., Hallmark Cards, Inc., Bill Melendez Productions, Advance Publications, Inc., Random House, Inc., Scholastic, Inc., SI Holdings, King Features Syndicate, Inc., Cowles Syndicate, Inc., Washington Post, IBC Holdings Corporation, ABC, Inc.,

Kmart Corporation and Universal Press Syndicate, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint and Memorandum in Support, filed March 21, 1997;

13. Defendant Sears' Joinder in RCA Defendants' Motion to Dismiss, filed March 21, 1997; and

14. Defendants CBS, Inc., Turner Broadcasting System, Inc., and The Walt Disney Company's Motion to Dismiss for Failure to State a Claim, filed March 21, 1997.

FURTHER, IT IS RECOMMENDED that the following motions filed by Plaintiff be denied:

1. Motion for Rule 56 Summary Judgement on Proportion of Plaintiff's 21st Claim; Against Co-Defendants King Soopers and Safeway Inc., filed January 8, 1997;

2. Motion for Rule 56 Summary Judgement on Proportion of Plaintiff's Twentieth Claim, Against Sears Roebuck and Company, filed January 29, 1997;

3. Motion for Rule 56 Summary Judgement on Proportion of Plaintiff's 21st Claim; or a Jury Trial Against Co-Defendants King Soopers, Safeway Inc., Albertson's & Tyson Foods, filed February 11, 1997;

4. Motion for a Rule 56 Summary Judgement or a Jury Trial on Plaintiff's 35th Claim Against Accessed Universal Press Syndicate Inc., and Motion to Strike UPS Unresponsive Sham Pleading, filed March 5, 1997;

5. Plaintiff's Response Brief to Defendant Sears, Roebuck and Co. and Motion to Strike Defendants Motion to Dismiss and Strike Defendants Brief as a Sham Pleading, filed March 7, 1997;

6. Motion for a Rule 56 Summary Judgement or a Jury Trial on Proportion of Plaintiff's Twentieth Claim, Against Defendants General Electric Company, Thomson Consumer Electronics, Inc/RCA Montgomery Ward & Co., Jack Barton & Co., Fingerhut Corporation and Best Buy, filed March 10, 1997;

7. Motion for Rule 56 Summary Judgement or a Jury Trial for All Profits on Plaintiff's 16th and 17th Claims; Against Metropolitan Life Insurance Company, Accessed United Features Syndicate, Charles M. Schulz and Vicarious Infringers ABC, CBS, filed March 17, 1997;

8. Motion by Plaintiff Opposing TCIOC (TCI) and Defendants' Opposition to Plaintiff's Amended Complaint (Already Granted) and Motion to Strike TCIOC's Motion for a Summary Judgement and Dismissal; and Strike TCIOC's Answer as a Sham Defense *Plaintiff Also Motions for a Rule 56 Summary Judgement Against TCI on 18th, 19th & 22nd Claims or a Jury Trial on TCI profits by Transmitting "It's a Mystery, Charlie Brown"; by Accessed Disney who Willfully Infringed Plaintiff's Copyrights Four Times, filed March 17, 1997;

9. Plaintiff's Brief Opposing Accessed Defendant Universal Press Syndicate's Motion to Dismiss and Strike Plaintiff's Complaint and Motion to Strike Defendant's Brief as Anther Unresponsive Pleading to Plaintiff's 35th Claim, filed April 10, 1997;

10. Motion for a Rule 56 Summary Judgement or a Jury Trial on Plaintiff's 5th - 6th - 12th - 14th - 18th - 19th - 22nd - 25th - 30th - 32nd - 39th & 41st Claims Against Accessed Defendants, filed April 30, 1997; and

11. Motion for a Rule 56 Summary Judgement or a Jury Trial on Plaintiff's 26th - 27th - 28th - 29th - 31st and 42nd Claims

Against Accessed Defendants, filed June 2, 1997.

FURTHER, IT IS ORDERED that pursuant to Fed. R. Civ. P. 72(b), the parties have ten (10) days after service hereof to serve and file written, specific objections to the findings of fact, conclusions of law, or recommendations of the Magistrate Judge with the District Judge assigned to the case. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file such written specific objections to the findings of fact, conclusions of law and recommendations of the Magistrate Judge as set forth in this document **will bar** the party from a de novo determination by the District Judge. United States v. Raddatz, 447 U.S. 667, 676-83 (1980). Additionally, the failure to file written specific objections to the findings of fact, conclusions of law or recommendations of the United States Magistrate Judge in this document within ten (10) days after being served with a copy **will bar** appellate review of the findings of fact, conclusion of law or recommendations of the Magistrate Judge. Thomas v. Arn, 474 U.S. 140 (1985); Talley v. Hesse, 91 F.3d 1411 (10th Cir. 1996).

Dated at Denver, Colorado, this 4th day of June 1997

By the Court:

s/D.E. Abram

D.E. Abram

United States Magistrate Judge